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SEP 14 1940
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 432

EINSON-FREEMAN CO., INC.,

Petitioner,

v.

WALTER E. CORWIN, individually and as former Collector of Internal Revenue, and ALMON G. RASQUIN, individually and as Collector of Internal Revenue,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

DANIEL GORDON JUDGE,
Attorney for Petitioner.

THE COURT PRESS, N. Y. C.

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PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Einson-Freeman Co., Inc., respectfully shows to this Court as follows:

This is a petition for a writ of certiorari to the Circuit Court of Appeals, Second Circuit, to review the decision of that Court which reversed the judgment for your petitioner, the plaintiff below, by the United States District Court for the Eastern District of New York.

Opinions Below.

The opinion of the District Court (R. 68) is reported in 29 F. Supp. 98. The opinion of the Circuit Court of Appeals, Second Circuit, is reported in 112 F. (2d) 683.

Jurisdiction.

The mandate of the Circuit Court of Appeals was entered June 17, 1940. The case arose under the Internal Revenue Laws; the jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; 43 Stat. 938; 28 U. S. C. A. 347.

Statement.

The petitioner, the taxpayer, started suit on January 10, 1939 (R. 1) against Walter E. Corwin, individually and as former Collector of Internal Revenue, and Almon G. Rasquin, individually and as Collector of Internal Revenue, to recover manufacturer's excise tax and interest thereon, assessed against the petitioner and paid to the defendants under Section 609 of the Revenue Act of 1932, amounting to $11,643.88 and $8,141.72, respectively (R. 3-9). Judgment was entered in favor of the petitioner on October 30, 1939, against the defendants respectively, for the sums of $10,830.98 and interest, and $7,216.78 and interest and costs (R. 92, 93). Pursuant to the Mandate of the Circuit Court, an order was entered on August 2, 1940, reversing said judgment, and dismissing the complaint.

The tax sought to be recovered was assessed against and paid by the petitioner during the period from February 27, 1933, to December 29, 1933, as a manufacturer's excise tax on sales of jig-saw puzzles (R. 9). On February 4, 1937, the petitioner filed a claim for refund, the claim relied upon in the complaint (R. 6). This claim was disallowed on August 4, 1937 (R. 56). The defendants in their answer set up the statute of limitations as a complete defense, based upon the filing of a prior claim for refund on January 15, 1935, its disallowance on August 13, 1935, and the fact that petitioner did not start this action within two years after the mailing of the notice of disallowance of the said claim (R. 10-12). The defendants conceded that the tax was illegally collected under the decision of this Court in *White* v. *Aronson*, 302 U. S. 16 (R. 69).

The Question Involved.

The question involved is whether this action is timely if commenced within two years after the disallowance of a claim for refund but more than two years after the disallowance of a prior claim for refund. The District Court concluded that this action was timely (R. 81). The Circuit Court held that the suit was barred by limitations. Corollary to the principal question are the further questions (a) whether the two refund claims were filed on the same grounds, and (b) if they were filed on the same grounds, whether there is any prohibition against a taxpayer's filing two or more refund claims pertaining to the same tax on the same grounds.

Reasons for Granting the Writ.

1. The mandate of the Circuit Court, Second Circuit in this case is in direct conflict with the decision

of the Circuit Court, First Circuit in the case of *Pacific Mills* v. *Nichols*, 72 F. (2d) 103.

2. The case involves an important question of federal law which has not been, but should be, settled by this Court.

3. The Circuit Court departed from the accepted and usual course of judicial proceeding in that:

(a) The Circuit Court based its decision in part upon a portion of R. S. 3226, as amended by §807, Rev. Act of 1936 (26 U. S. C. A. Int. Rev. Code §3772) which is inapplicable;

(b) The Circuit Court completely disregarded a finding of fact made by the District Court, in violation of Rule 52 of the Federal Rules of Civil Procedure.

Conclusion.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted to review the mandate of the Court below and that your petitioner may have such other and further relief as the ends of justice may require.

Respectfully submitted,

Daniel Gordon Judge,
Attorney for Petitioner.